

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suede G. Kelly.

Consumers Power Company

Docket No. PR97-1-001

ORDER DENYING REHEARING AND MOTION FOR LEAVE
TO FILE REQUEST FOR CLARIFICATION

(Issued December 23, 2003)

1. Consumers Energy Company (Consumers), formerly Consumers Power Company, filed a timely request for rehearing of an order issued by the Commission on September 27, 2002,¹ rejecting Consumers' rate filing regarding a new charge it intended to impose on non-physical transfers of gas. Additionally, on January 23, 2003, Consumers filed a motion for leave to file a request for clarification of the September 27 Order, proposing an alternative resolution. In this order, the Commission denies both Consumers' rehearing request as well as its motion for leave to file a clarification. Our action today benefits customers by ensuring that they pay fair and equitable rates for the non-physical transfer of natural gas.

Background

2. Consumers is a Hinshaw pipeline with facilities in the State of Michigan. This case arose from Consumers' filing of a revised statement of operating conditions pursuant to Section 284.123(e) of the Commission's regulations.² Consumers' filing proposed a separate, nominal rate for non-physical transfers of natural gas occurring prior to the gas being physically transported under its blanket certificate. The September 27 Order held that because Consumers did not have an intrastate rate on file for title transfer services, Section 284.123(b) (1) of our regulations did not permit it to base its rate on an approved

¹ Consumer Power Company, 100 FERC ¶ 61,354 (2002) (September 27 Order).

² 18 C.F.R. § 284.123 (e) (2003).

intrastate rate.³ Therefore, the Commission reviewed the proposal as a petition for rate approval under the fair and equitable standard set forth in Section 284.123(b) (2).

3. The September 27 Order rejected Consumers' proposed rate under the fair and equitable standard because no cost support was provided and it was applied on a volumetric basis, which bore no relationship to the costs incurred in providing the service. In this regard, we observed that "the costs of the service are more a function of each transaction, rather than the volumes transferred."⁴ The Commission thus invited Consumers to refile its proposed title transfer fee on a per-transaction basis.

4. The September 27 Order also took notice of the decision by the Michigan Public Service Commission (Michigan Commission) subsequent to Consumers' filing here. The Michigan Commission held that Consumers' title transfer tracking fee was not subject to its regulations because the relevant service neither provides for the transportation of gas nor provides a service integral to or required for such transportation. On this point, the Commission stated:

Our decision is based on federal law and the pleadings before us, and is independent of the state proceedings. The parties have not argued that the Commission lacks jurisdiction over Consumers' proposal. In any event, regardless of the jurisdiction of the [Michigan Commission], this Commission has jurisdiction over the type of title transfers engaged in by Consumers. Title transfers are an integral part of the transportation nomination and balancing process and therefore are within the Commission's jurisdiction.^[5]

5. In its request for rehearing, Consumers first complains that it was "[f]acially [a]rbitrary and [c]apricious" for the Commission to take so long to reach a decision in this proceeding.⁶ In this regard, Consumers relies on judicial precedent stating that a "reasonable time for an agency decision" should not extend to "several years or a decade."⁷ Indeed, Consumers asserts, it expected summary action in its favor: either the

³ 18 C.F.R. § 284.123 (b).

⁴ September 27 Order at P 17.

⁵ Id. at P 21 (footnote omitted).

⁶ Consumers Request at 5.

⁷ Id., quoting Midwest Gas Users Association v. FERC, 833 F.2d 341, 359 (D.C. Cir. 1987) (Midwest Gas Users) and MCI Telecommunications Corp. v. FCC, 627 F.2d 322, 340 (D.C. Cir. 1980) (MCI).

Commission would hold the service non-jurisdictional, or find that Consumers' "transportation rates" already approved by this Commission "should be applicable."⁸ Consumers further argues that the Commission's treatment of the filing as a petition for rate approval (rather than a revision to Consumers' operating statement) does not provide a sufficient explanation for the amount of time involved.

6. Consumers' second argument is that the Commission's assertion of jurisdiction was unsatisfactory in view of the September 27 Order's failure to take into account that non-physical, rather than physical, title transfers are at issue here. On this point, Consumers asserts that the Commission's "only justification" for asserting jurisdiction is that "[t]itle transfers are integral part of the transportation and balancing process[.]"⁹ According to Consumers, this is inconsistent with the fact that

title transfer tracking/certifying services for non-physical transfers of gas have not been so integral to transportation that the Commission has required them of any jurisdictional pipeline until October 1, 2002 (three days after the issuance of the [September 25] Order) and even then, it was only interstate pipelines (not intrastate or Hinshaw pipelines like Consumers) that has such a requirement.[¹⁰]

7. Finally, Consumers argues that the Commission erroneously concluded that it had not elected to use rates contained in a transportation rate schedule governing comparable service on file with the appropriate state regulatory agency. In support of this claim, Consumers states that its SC-T intrastate rate on file with the Michigan Commission, which "did not incorporate such rates for an ongoing title transfer service," was nonetheless a rate for comparable service under Section 284 because "it did incorporate those rates for a gas imbalance resolution option at the end of" either the contracted service or the pilot program under which the service was offered.¹¹

8. On January 23, 2003, while its rehearing request was still pending, Consumers filed a motion for leave to file a request for clarification, and a request for clarification of the September 25 Order. Consumers asserts that there is good cause to grant its motion for leave to file as it believes that its proposed clarification "may expedite resolution" of the case "in a manner satisfactory to the Commission, Consumers and all interested

⁸ Id. at 6.

⁹ Id. at 9.

¹⁰ Id., citing Order No. 587-Q, 100 FERC ¶ 61,105 at 61,417 (2002).

¹¹ Id. at 12 (emphasis in original).

parties.”¹² In its request, Consumers asks that the Commission clarify that as to the transactions at issue, “Consumers has the legal authority to assess and collect Commission approved volumetric rates for those “integral”/necessary services up to the level of its maximum transportation rate.”¹³

Discussion

9. The Commission denies Consumers’ request for rehearing. First, we reject Consumers’ notion that the Commission is without jurisdiction over non-physical title transfers. As the September 27 Order indicated, the transfer service is an integral part of gas transportation and balancing. At the outset, the timing of our requirement for pipelines to maintain title transfer tracking services is simply irrelevant to our authority over such transactions. In any event, Consumers is incorrect that we did not regulate title transfer tracking until 2002. Rather, such regulation goes back to 1996.¹⁴

10. Turning to the actual question of jurisdiction, the Commission finds that title transfer tracking service is a jurisdictional transportation service. Section 4 of the Natural Gas Act establishes that the Commission’s jurisdiction extends to “all rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas. . . .”¹⁵ First, as Consumers describes the service at issue here, it involves situations in which its “transportation customers . . . receive gas through non-physical title transfers which precede the receipt of gas under their transportation contract.”¹⁶ Here, the gas in question has been transferred to the pipeline by the first shipper to be included in that shipper’s pool. The gas is then transported to the pool of the second shipper. The title transfer rate is the rate to cover the pipeline’s cost of providing this transportation service using its facilities.¹⁷

¹² Consumers Motion at 1.

¹³ Id. at 3 (emphasis in original).

¹⁴ See, e.g., Trunkline Gas Co., 75 FERC ¶ 61,003 (1996).

¹⁵ 15 U.S.C. § 717c (a) (2000) (emphasis added).

¹⁶ Consumers October 1, 1996 Statement at 2.

¹⁷ Whether gas molecules physically move is not determinative of whether a transportation service has been performed. Transportation occurs because the pipeline delivers gas on behalf of one shipper to another shipper. Backhaul transactions, for example, are transportation even though no gas is transported backwards. Similarly, transfers of storage gas between shippers may not involve the movement of gas

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11. Moreover, these transactions are integrally related to transportation service, and therefore fall within Section 4's jurisdictional coverage of rates and charges "in connection with" transportation. The courts have affirmed the Commission's jurisdiction over matters "in connection with" natural gas transportation even with respect to regulation of certain aspects of gathering, which in itself is beyond the agency's statutory purview.¹⁸ Pipelines are required to transport gas only when the shipper has title to the gas. When the pipeline processes title transfers between shippers, that information is, therefore, essential to the ability of the receiving shipper to effectuate transportation on the pipeline. Just as the pipeline's provision of gathering service is related to and thus jurisdictionally "in connection" with transportation, so also the provision of title transfer service is integral to the ability of a shipper to obtain transportation and within this grant of jurisdiction.

12. We also reject Consumers' theory that its SC-T intrastate rate can be considered a comparable rate under Section 284 of the Commission's regulations. As Consumers concedes, this rate is for a gas imbalance resolution option, not a title transfer service. Thus, it is a rate for a separate and distinct service, not a comparable rate according to the terms of the regulations.¹⁹

13. Finally, contrary to Consumers' apparent assumption, our decision on the merits of its filing was in no way affected by, or an effort to justify, the amount of time involved in deciding this case. While the Commission regrets that it did not act more quickly, this provides no basis for rehearing as Consumers neither alleges any injury stemming from the delay (no refunds are at issue), nor proposes a relevant remedy.²⁰

14. The Commission also denies Consumers' motion for leave to file a request for clarification of the September 25 Order. Consumers' proposed alternative should have

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molecules, but is a jurisdictional service integrally related to the storage and ultimate transportation of gas.

¹⁸ See Northern Natural Gas Co. v. FERC, 929 F.2d 1261 (8th Cir. 1991)

¹⁹ In any event, the Commission has limited the definition of comparable service to city gate service, which does not cover Consumers' proposed service. Order No. 46-A, FERC Stats. & Regs., Reg. Preambles [1977-1981] ¶ 30,104 at 30,736 n.3.

²⁰ Neither MCI nor Midwest Gas Users are apposite here, as they involved situations in which the court acted to compel agency action prospectively.

been raised on rehearing, and is now time barred. In any event, Consumers' alternative is based on the volumetric method that we have already rejected in this case.

The Commission orders:

(A) Consumers' request for rehearing is hereby denied.

(B) Consumers' motion for leave to file a request for clarification is hereby denied.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.